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IN THE

Supreme Court of the United States

October Term, 1964.

No. 560

LESTER DAVIS,

Petitioner,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

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To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Lester Davis, by his attorneys, Richter, Lord, Toll & Cavanaugh, Esquires, respectfully petitions that a Writ of Certiorari issue to review the mandate of the Court of Appeals of Maryland, entered on July 9, 1964.

OPINIONS BELOW.

The opinion of the Court of Appeals of Maryland in this F. E. L. A. action is to be found in the appendix to this petition. This is a final judgment in the State of Maryland, where judgment was entered for the defendant reversing the judgment of the Superior Court of Baltimore City in favor of your Petitioner in the amount of $10,000.00, such amount being awarded by a jury after a trial upon the merits. Chief Justice Brune and Mr. Justice Hammond dissented.

JURISDICTION.

The mandate of the Court of Appeals of Maryland was entered July 9, 1964. The jurisdiction of this Court is invoked under the Act of June 25, 1948 c. 646, 62 Stat. 929, 28 U. S. C. § 1257(3), since the construction of a federal statute is involved. The Court of Appeals of Maryland is the highest court of that state.

QUESTIONS PRESENTED.

1. Did not the Court of Appeals of Maryland err in reversing the judgment of a Maryland lower court entered upon the verdict of a jury after a trial on the merits of the claim by an employee of an interstate railroad under the Employers' Liability Act, 45 U. S. C. § 51, August 11, 1939, c. 685, 53 Stat. 1404, on the grounds that the evidence was legally insufficient to show that another railroad employee was operating the railroad owned tractor which struck and injured the plaintiff, without giving to the plaintiff the benefit of (a) any evidentiary inferences arising under the federal law of negligence arising from proof of ownership of the tractor; (b) the doctrine of res ipsa loquitur?

2. When a state court applies the federal law of negligence in a case arising under the Employers' Liability Act, *supra,* must not the state court under the doctrine of stare decisis in applying the federal law of negligence follow the decisions of this Court and, in the absence of a decision by this Court, must it not apply the common law of negligence as such is understood in the majority of common law jurisdictions, and, in the absence of a generally recognized rule governing the case, must not the state court apply, at the very least, the common law of that state?

THE STATUTE INVOLVED.

The Federal Employer's Liability Act, 45 U. S. C. § 51, August 11, 1939, Chapter 685, 53 Stat. 1404, which reads in pertinent part as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

STATEMENT OF THE CASE.

On January 2, 1959, the petitioner, Lester Davis, was employed by the Baltimore and Ohio Railroad Company (hereinafter "B&O") as a tallyman and trucker, assigned to handle freight at Pier 8 of the employer railroad's Locust Point terminal in the City of Baltimore (E. 6). Pier 8 (an enclosed pier), has two floors (E. 7). Petitioner's foreman told him to gather merchandise from the second floor and bring it to the first floor (7). The pier has four elevators, two on the east side and two on the west, opposite each other, and about one hundred feet apart (E. 10, 11). Davis went up in the south elevator on the west side and walked north, where he saw a gang at work putting sugar on pallets (E. 12). After securing the help of one of these men in putting some boxes on a hand truck, he crossed to the east side of the pier, picked up another box near the north elevator on that side, and walked to the vicinity of the south elevator on the east side where he checked other

boxes and found he did not want them (E. 12, 13). The elevator was then on the ground floor. He called for it to come up and while waiting for it put in his pocket the merchandise list he had been using and pulled out another one and started to examine it while facing the elevator. While so looking, he was struck from behind by a Yale fork lift tractor (E. 13). The tractor was owned by the employer railroad and had been operated that day by an employee of the B&O (E. 69). He was struck in the back (E. 19, 22) and slid on his stomach five to seven feet across the floor into the shaft (E. 18, 22). He fell six or seven feet into the shaft to the top of the elevator (E. 18, 22) landing on his shoulder or his side (E. 19). The tractor landed beside him with its blades pointing upwards (E. 22, 23). Neither the petitioner nor the witnesses who testified on his behalf were able to say who was driving the tractor when he was hit. A longshoreman, Waldon, did testify that he saw a tall heavy-set man wearing a blue coat whom he thought to be an employee of the B&O walking away "fast" from the elevator in question (E. 31, 32). The longshoreman did not see who was driving the tractor nor did he see it strike Davis. The railroad produced the regular operator, Brown, who had been operating the tractor on the day of the accident (E. 66, 67). He testified that immediately before the occurrence he had parked the tractor in order to go to the lavatory. While in the washroom, he heard a noise and came out, and found the tractor in an elevator shaft (E. 67, 68). He waited until the tractor was brought up and retrieved the keys (E. 68). Brown admitted to weighing something over 200 pounds on the date of the accident (E. 69). The railroad also brought forward as a witness one Byrd, also a B&O employee, who testified that he saw the petitioner get on the tractor and back it across the pier into the elevator shaft (E. 78). Even the most cursory reading of Byrd's cross-examination indicates, to say the very least, uncertainty as to every pertinent fact. His foreman, called in rebuttal, testified that at the time of the

accident he and Byrd (who had his eyes closed) were sitting next to each other on some sugar bags near another elevator. He, the foreman, did not witness the accident because the sugar was stacked too high to see the elevator into which Davis and the tractor fell, but he did hear a scream (E. 91, 97). The tractor driver, Brown, also stated that sugar was stacked between the two elevators. Another rebuttal witness, also a member of the sugar gang, testified that the stacked sugar prevented him from seeing the elevator in question (E. 99).

The railroad moved for a directed verdict at the close of all the evidence. The motion was denied by the Superior Court of Baltimore City and the jury returned a verdict for Davis in the amount of $10,000.00. The Court also denied railroad motions for a directed verdict and judgment non obstante veredicto.

Upon appeal to the Court of Appeals of Maryland it was held that the trial court erred in denying the motions, holding that there was no proof, direct or circumstantial that another railroad employee was operating the tractor which allegedly knocked Davis into the elevator shaft, and the fact that the longshoreman saw a man whom he surmized to be a railroad employee walking swiftly away from the scene of the accident (but who had not been seen operating the tractor or jumping from it) did not reasonably support an inference that the unidentified man (even assuming him to be a railroad employee) was operating the tractor or, if he were, that he was operating it in a negligent manner. The Maryland Court held that any such inference would be mere speculation or conjecture and that the evidence was therefore "legally insufficient to show that a railroad employee was operating the tractor and that the issue of employer negligence with respect to the operation of the tractor should not have been submitted to the jury." (Appendix, 26, 27)

Chief Justice Brune and Mr. Justice Hammond dissented without opinion. This Petition for Certiorari follows.

REASONS FOR GRANTING THE WRIT.

Respondent well knows the heavy burdens on the Supreme Court and appreciates its reluctance to second guess the second guess of a state appellate court. The result reached by the highest court of the State of Maryland, though, illustrates a necessity that this Court definitively lay down guide lines for state courts who have to apply the federal law of negligence under the Employers' Liability Act (*Urie v. Thompson*, 337 U. S. 163, 174, 69 S. Ct. 1018).

The fatal flaw in the majority opinion in the court below was, having recognized that, while state courts have concurrent jurisdiction with the District Courts of the United States to try cases brought under the F. E. L. A., the question as to what constitutes negligence under the Act is a matter of federal law and that the federal decisions are controlling, the court below applied no law, federal or Maryland, in determining that the evidence was legally insufficient for submission to the jury.

Paradoxically, Maryland law and federal law, as applied to issues held determinative by the court below, are the same.

This Petition should be granted, therefore, for the following reasons:

1. The court below's reversal of plaintiff's judgment in this F. E. L. A. suit for insufficiency of evidence improperly invaded the province of the jury: *Gallick v. The Baltimore and Ohio Railroad Company*, 372 U. S. 108, 83 S. Ct. 659 (1963); *Harrison v. Missouri Pacific Railroad Company*, 372 U. S. 248, 83 S. Ct. 690 (1963); *Basham v. The Pennsylvania Railroad Company*, 372 U. S. 699, 83 S. Ct. 965.

2. The Court below erroneously disregarded the common law rule that once the ownership of a vehicle is established (E. 69), a rebuttable presumption arises

that at the time of an accident it was operated by the owner, its servant, agent or employee and that the issue of who was driving or operating the motor vehicle at the time of the accident is a question for the jury in the absence of countervailing evidence by the defendant which is clear, positive, uncontroverted, uncontradicted, and the credibility of the defendant's witnesses as to non-agency is obvious: Annotation, 5 A. L. R. 2d 196-249; *Salowich v. Kres,* 147 Md. 23, 127 A. 643; *Fowser Fast Freight v. Simmont,* 196 Md. 584, 78 A. 2d 178; *Grier v. Rosenberg,* 213 Md. 248, 131 A. 2d 737.

3. The Maryland Court did not heed evidentiary presumptions raised by the doctrine of res ipsa loquitur: *Jesionowski v. Boston & Maine Railroad Co.,* 329 U. S. 452, 456, 67 S. Ct. 401, 403.

ARGUMENT.

Point One.

The Maryland Court Improperly Invaded the Function of the Jury.

In *Basham v. The Pennsylvania Railroad Company, supra,* this Court reiterated that in an action under the F. E. L. A. to recover damages for personal injuries where a jury had heard conflicting evidence relating to the plaintiff's claim and rendered a verdict in his favor, which verdict had an evidentiary basis, it was error for the State Court to reevaluate the conflicting evidence and set aside the verdict on the grounds that negligence was not established.

The court below committed the error deprecated in *Basham.* As the court below pointed out, the questions on appeal related to the sufficiency of the evidence as to employer negligence and the correctness of the trial court instructions requiring the jury to use a measure of speculation or conjecture in arriving at its verdict. Although the decisional point was that the evidence was legally insufficient to support the verdict, the legal authorities cited in the opinion dealt with the second question, i.e., speculation or conjecture, and had no applicability to the *ratio decidendi.* The court below decided that there was no proof, direct or circumstantial, that another railroad employee was operating the tractor which knocked Davis into the elevator shaft, or, assuming that a B&O employee did drive the tractor, that the accident was caused by the negligence of such employee.

The applicable tests have been laid down quite clearly by this Court in *Rogers v. Missouri Pacific Railroad Company,* 352 U. S. 500, 506, 77 S. Ct. 443, 448 (1956) as follows:

> "Under this statute [F. E. L. A.] the test of a jury case is simply whether the proofs justify with reason

the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or in part' to its negligence."

Again, in *Sinkler v. Missouri Pacific Railroad Company*, 356 U. S. 326, 329, 78 S. Ct. 758, this Court said:

". . . In interpreting the F. E. L. A. we need not depend upon common law principles of liability. This statute, an avowed departure from the rules of the common law . . . was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety (citing case). The cost of human injury, an inescapable expense of railroading, must be borne by someone, and the F. E. L. A. seeks to adjust that expense equitability between the worker and carrier, (citing case). . . . Thus while the common law had generally regarded the torts of fellow servants as separate and distinct from the torts of the employer, holding the latter responsible only for his own torts, it was the conception of this legislation that the railroad was a unitary enterprise, its

economic resources obligated to bear the burden of all injuries befalling those engaged in the enterprise arising out of the fault of any other member engaged in the common endeavor. Hence a railroad worker may recover from his employer for an injury caused in whole or in part by a fellow worker, not because the employer is himself to blame, but because justice demands that one who gives his labor to the furtherance of the enterprise should be assured that all combining their exertions with him in the common pursuit would conduct themselves in all respects with sufficient care that his safety while doing his part will not be endangered. If this standard is not met and injury results, the worker is compensated in damages."

The master question before the Court of Appeals of Maryland, then, was, whether the proofs adduced by the plaintiff and obviously believed by the jury justified, with reason, the conclusion that the employer negligence played any part, even the slightest, in producing the injury; *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U. S. 521, 77 S. Ct. 457.

The very nature of a railroad employee's duties—the fact that when he is injured by an instrumentality of the railroad, his fellow employees are similarly engaged in their tasks—makes it virtually impossible for the injured employee to produce any testimony from persons who actually saw the accident. Circumstantial evidence must be resorted to. Mysterious accidents happen, but those accidents would not be at all mysterious had a fellow employee been so careless of his duties as to be in a position to see what happened. This Court said in *Schulz, Admx. v. The Pennsylvania Railroad Company*, 350 U. S. 523, 76 S. Ct. 608, 610 (1956), an action under the Jones Act by the administratrix of a tug fireman who disappeared while at work and was found drowned, at 350 U. S. p. 525:

"In considering the scope of the issues entrusted to juries in cases like this, it must be borne in mind that

negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre. But measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done or failing to do that which a person of reasonable prudence would have done under like circumstances. Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. '[W]e think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact why it should not decide such questions as well as others.' *Jones v. East Tennessee V. & G. R. Company,* 128 U. S. 443, 445 (1888)." (9 S. Ct. 118)

However the railroad may twist and turn, the inescapable fact in this case is, that a jury of twelve persons after a full hearing of both the plaintiff's and defendant's evidence decided that the railroad was negligent. Obviously the jury had to resort to inferences in order to reach their conclusion. It is invidious for the railroad to argue that the jury's verdict on the proofs adduced was irrational. In effect the railroad says, that the jury's decision was arbitrary and capricious.

Though the jury might well, with reason, have deemed it negligence on Brown's part to leave his tractor unattended without removing the keys, basically the facts in this case were: that a vehicle owned by the railroad and operated in pursuance of the railroad's business by an employee of the railroad until a short time before the accident, propelled another employee of the railroad into an elevator shaft. The jury's determination was rational on the basis of these bare facts. The Maryland Court

might well have remembered what Gibson, C. J. said in *Commonwealth v. Harman,* 4 Pa. 269, 273:

> "All evidence is more or less circumstantial, the difference being only in the degree; and it is sufficient for the purpose when it excludes disbelief; that is, actual, and not technical disbelief; for he who is to pass on the question is not at liberty to disbelieve as a juror while he believes as a man. It is enough that his conscience is clear."

Or what Judge Learned Hand said in *U. S. v. Becker,* 62 F. 2d 1007, 1010:

> "All conclusions have implicit major premises drawn from common knowledge; the truth of testimony depends as much upon these, as do inferences from events. A jury tests a witness's credibility by using their experience in the past as to similar utterances of persons in a like position. That is precisely the same mental process as when they infer from an object what has been its past history, or from an event what must have preceded it."

We will labor the point no further. Perhaps in other contexts the Maryland Court's analysis is sound; it cannot be correct when an injured employee is in a situation where there are likely to be no eyewitnesses. As likely as not the only possible eyewitnesses are his fellow employees. As pointed out, if they are intent upon their jobs (and it must be presumed that they are) they will not see the accident. Circumstantial evidence is often all that is available in these railroad cases. A reviewing court should not be hasty in lifting the accident out of its context or to forget that the Employers' Liability Act was specifically enacted with that context in mind by the legislature.

This point in our argument is concerned with that imponderable, reasonableness. It must be remembered, also, that in the course of the development of the common law

of evidence, the very absence of eyewitnesses and the innate possibility that an event may have been the result of wrongful action or inaction has forced the development of certain presumptions. Rebuttable presumptions, to be sure, but legal evidence nevertheless in the absence of rebuttal. The jury in this case arrived at its determination by the application of reason. It's instinct was thoroughly agreeable with presumptions long recognized by the law. We will in the next two points of our argument demonstrate that the jury would and should have arrived at the same result through the application of two evidentiary rules well known to the common law and familiar in the vast majority of common law jurisdictions. They are (1) res ipsa loquitur and (2) the presumption that when there is a question as to who was driving a vehicle at a given time, it will be presumed that the operator was at that time the owner or his agent, servant or employee, absent clear, uncontradicted, and credible evidence to the contrary.

Point Two.

The Maryland Court Ought to Have Given Petitioner the Benefit of Inferences Arising Under the Doctrine of Res Ipsa Loquitur.

Although the doctrine of Res Ipsa Loquitur was not mentioned at trial nor argued on appeal the jury nevertheless returned a verdict for petitioner without its aid. The reversing court should have, in examining the evidence for legal insufficiency, been doubly careful to give petitioner the benefit of all inferences arising under the doctrine.

The doctrine is a rule of evidence: it does not have to be pleaded in the complaint or brought to the attention of the adverse party since it is neither a ground for recovery, a cause of action, nor an issue: *Fasshinder v. Pennsylvania Railroad Co.*, 322 F. 2d 859 (CA 3, 1963). In *Jesionowski v. Boston & M. Railroad Co., supra,* 329 U. S. at 454, 67 S. Ct. at 402 this Court described the doctrine as a "trial

rule under which negligence may be inferred from unusual happenings growing out of conditions under a defendant's control".

Res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; *that they furnish circumstantial evidence of negligence* where direct evidence of it may be lacking. The rule does not forestall the verdict but it compels a decision (one way or another) *by* the jury: *Sweeney v. Erving*, 228 U. S. 233, 240, 33 S. Ct. 416; *Jesionowski v. Boston, etc., Railroad Co., supra.* If the rule is applicable, a reviewing court may never declare the evidence legally insufficient on the issue of negligence. Nor does the existence of the rule reduce the jury's power to draw inferences from facts: *Jesionowski, supra,* 329 U. S. 452, 67 S. Ct. 401.

The definition of the doctrine adopted by this Court in *Jesionowski* is as follows:

> "When a thing which causes the injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such, as in the ordinary course of things, does not occur if the one having such control uses proper care, it affords *reasonable* evidence, in the absence of explanation, that the injury arose from the defendant's want of care." 329 U. S. 456, 67 S. Ct. 403. (Emphasis supplied.)

The facts of this case show the fork-lift tractor to have been under the exclusive control of the railroad. Fork lift tractors do not usually propel themselves and bystanders into elevator shafts. The jury chose to disbelieve the railroad's explanation. There was, then, reasonable evidence that the injury arose from the railroad's want of care. Reasonable evidence we assume to be legally sufficient.

The Court below erred, therefore, in deciding that the evidence of negligence was legally insufficient to show negligence on the part of the railroad employee.

Point Three.

The Court Below Ought to Have Given Petitioner the Benefit of Inferences Arising From the Defendant's Proven Ownership of the Vehicle Involved.

The court below also decided that there was, legally speaking, insufficient evidence for the jury's determination that a railroad employee operated the tractor at the time of the accident.

It was proven by plaintiff and admitted by the defendant that the tractor was owned by the defendant railroad. It is an almost universal rule of the common law (including that of Maryland) that where there is a question as to who was operating a vehicle, and if, after plaintiff offers proof of the defendant's ownership, defendant offers no evidence or slight evidence on the issue of agency, the trial court should instruct the jury that if they find the defendant to be the owner, they must find he is responsible for the negligence, if any, of the driver. The defendant's evidence to the contrary may be so conclusive that it shifts the burden of going forward to the plaintiff and if the plaintiff does not produce further evidence the defendant is entitled to a directed verdict. However, if the evidence falls between the two categories the issue of agency should be submitted to the jury; *Grier v. Rosenberg,* 213 Md. 248, 131 A. 2d 737; Annotation, 5 A. L. R. 2d 196-249.

The evidence produced by the defendant owner to destroy the presumption that the operator of the vehicle is the agent or servant of the owner must, as a matter of law, be uncontradicted and conclusive, and if the evidence as to agency is not contradicted or, if contradicted, is not conclusive, it becomes a question of fact for the jury: *Scott*

v. James Gibbons Co., 192 Md. 319, 64 A. 2d 117; *Fowser Fast Freight v. Simmont*, 196 Md. 584, 78 A. 2d 178.

The general rule is that if the defendant's countervailing evidence is not clear, positive, uncontroverted, uncontradicted, and credible, and is inconclusive and reasonably subject to contradictory interpretation, or if more than one inference may be drawn therefrom, or if it is inherently improbable, or of a suspicious nature, or the credibility of his witnesses is impeached or their evidence is so untrustworthy or contradictory that, upon a submission to the jury, the jury may be warranted in disbelieving them, or if the circumstances are such as to raise the reasonable inference that the vehicle was being operated in the owner's business, the presumption will not be regarded as overcome as a matter of law, and it is for the jury to pass upon the issue of the driver's agency and the jury's determination on that issue will be conclusive: 5 A. L. R. 2d 196, 220, § 4.

We will not at this point weary the Court by regurgitating the testimony of defendant's witnesses, Brown and Byrd. Suffice it to say that the jury disbelieved them. There were palpable inconsistencies in their testimony and such inconsistencies were in themselves enough to destroy the railroad's attempt to rebut the presumption or inference of agency raised by plaintiff's proof of ownership of the tractor by the defendant: *Salowich v. Kres*, 147 Md. 23, 127 A. 642.

In the case at bar, the plaintiff's proof of defendant's ownership of the tractor involved raised a presumption or inference that at the time of the accident the operator thereof was the servant or agent of the railroad. The defendant's evidence was not so conclusive or uncontradicted as to take the issue of agency from the jury, and the jury was entitled to infer that the tractor was being operated by the servant of the railroad in the course of his employment.

The jury drew this inference without benefit of instruction, but the absence of instruction did not invalidate their doing so. It is enough that their inference was agreeable with the law. Rather, the reviewing court made its contrary determination of legal insufficiency of the evidence on the issue of agency in the teeth of this legal inference. In so doing, it erred.

CONCLUSION.

WHEREFORE, Petitioner urges the grant of this petition, not just that justice be done in his case, but that the law may be more truly ascertainable in all cases such as his.

Respectfully submitted,

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APPENDIX.

Majority Opinion of the Court of Appeals of Maryland.

HORNEY, *J.*

In this acti brought in the Superior Court of Baltimore City by a railroad employee against the employer under the provisions of the Federal Employers' Liability Act for injuries sustained by the employee as a result of having fallen into an elevator shaft, the questions on appeal relate to the sufficiency of the evidence as to employer negligence and the correctness of court instructions that required the jury to use a measure of speculation or conjecture in arriving at its verdict.

Lester Davis, employed by the Baltimore and Ohio Railroad Company (B. & O. or railroad company) as a tallyman and trucker, was assigned to handle freight in an enclosed two floor pier at the Locust Point terminal in Baltimore City. The pier, which extends in a north-south direction with the shore end facing toward the south, is divided on each floor by a fire wall between its east and west sides. In that area of the pier between the fire wall and the shore (the part of the pier with which we are concerned) there are four elevators, two on the east side directly opposite two on the west side. The elevators on the east side of the pier, as well as those on the west side, are approximately one hundred feet apart, one being located toward the fire wall (or north) and the other toward the shore (or south). The elevators are not built against the walls, and each can be entered from either its east or west gate. There is an aisle or passageway on each side of the pier between the outside walls and the elevator.

At the time of the accident, stacks of palletized sugar approximately five feet high were arranged in the center

of the second floor extending from the two northern elevators to a point even with the two southern elevators (hereinafter referred to separately as the shore-end east elevator and the shore-end west elevator and collectively as the shore-end elevators).

According to Davis, his foreman told him to bring certain boxes of merchandise from the second floor of the pier to the first. While on the second floor searching for the boxes of merchandise, he walked to the vicinity of the shore-end east elevator and stopped to examine the list of merchandise he was using. The elevator was then on the first floor, but the west gate guarding the elevator shaft was propped six or seven feet above the floor by a board. As he was facing toward the east elevator looking at a box, a fork lift tractor struck him in the neck. He slid across the floor on his abdomen and fell into the elevator shaft and landed on his shoulder or side on top of the elevator, and the tractor landed beside him with its blades pointing upwards. Davis further testified that he knew the B. & O. employee, who had been operating a tractor on the second floor on the date of the accident, but did not identify him or anyone else as its operator at the time he said it struck him. Although Davis stated that he had never operated a tractor, his employment was terminated about three weeks later for the unauthorized use of a tractor on January 2, 1959, the date of the accident.

A longshoreman (Leroy Walden), testifying on behalf of Davis, stated that he had been on the second floor of the pier at the time of the accident. As he was walking south in the aisle on the east side of the pier and had gotten about half way between the two east-side elevators, he noticed a man standing with a piece of paper in his hands facing the east gate of the shore-end east elevator. (Note that Davis, by testifying that he was facing east, put himself in the position of facing the west propped up gate.) Walden glanced away, and "all at once" or "just a second later," he heard an impact and someone scream. He

went to the elevator shaft and saw Davis and the tractor (with its blades upwards) on top of the elevator. The east gate of the elevator was broken. He did not know where the men who helped Davis out of the shaft had come from and had not seen the tractor at any time until his arrival at the shaft after the accident. But he stated that just before he got to the elevator, after hearing the impact, he saw a man walking away "fast" from the other side (apparently meaning the west side) of the elevator toward the shore-end of the pier. He saw the man's back, not his face, and knew only that he was tall, heavy set and was wearing a blue coat. He was "pretty sure" that the man was not a longshoreman and "almost sure" that he was a B. & O. employee. When asked whether or not he had seen this man jump off the tractor, he replied that he did not know where the tractor had come from or who was operating it, and that he did not see the man jump off it.

The railroad company produced as a witness the regular operator (Arthur Brown), who had been operating the tractor on the day of the accident. He testified that immediately before the occurrence he had parked the tractor to the south of the shore-end east elevator in order to go to the lavatory. While in the washroom, he heard a noise, came out, and found the tractor in an elevator shaft on the west of the pier. (Since all other witnesses designated the shore-end east elevator as the place of the accident, it may be that Brown meant to say that he had parked the tractor beside the shore-end west elevator and had found it in the elevator shaft of the shore-end east elevator.) Brown also stated that sugar was stacked between the two shore-end elevators.

Another B. & O. employee (Robert Byrd) testified that there were no stacks of sugar between the shore-end elevators and that at the time of the accident he was standing between them; that the tractor was parked beside the shore-end west elevator; and that he saw Davis get on the tractor and back it across the pier through the wooden

elevator gate (probably the west side entrance) and into the shore-end east elevator shaft.

Two witnesses were called by Davis in rebuttal. One of them (Freeman Miller), another railroad employee, testified that Byrd worked in the same "sugar gang" as himself and that at the time of the accident he and Byrd, who had his eyes closed, were sitting next to each other on some sugar bags near the shore-end west elevator. He did not witness the accident because the sugar was stacked too high to see the shore-end east elevator, but he did hear a scream. The other witness (Leon St. Rose), another railroad employee and a member of the "sugar gang," testified that Byrd had not been working with them on the day of the accident and that he heard a scream but did not see the accident because he was on the west side of the pier and the stacked sugar prevented him from seeing the shore-end east elevator. Both Miller and St. Rose ran to the shore-end east elevator shaft after hearing the scream and helped Davis get out.

The railroad company moved for a directed verdict at the close of all the evidence. The motion was denied and the jury returned a verdict for Davis in the amount of $10,000. The court also denied a motion for judgment *n.o.v.*, and this appeal was taken.

The basic issue on this appeal, aside from that concerning the instructions, is whether or not there was sufficient evidence of negligence on the part of the employer to allow the case to go to the jury. This issue is governed by the standards of proof required by the Federal Employers' Liability Act, 45 U. S. C., §§ 51-60, § 51 of which provides in pertinent part:

> "Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents or

employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Although state courts (under § 56 of 45 U. S. C.) have concurrent jurisdiction with the district courts of the United States to try cases brought under the F. E. L. A., the question as to what constitutes negligence under the act is a matter of federal law and the federal decisions are controlling. *Urie v. Thompson*, 337 U. S. 163, 174 (1949).

In *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 32 (1944), the Supreme Court of the United States said that in order to recover under the F. E. L. A., the claimant must prove that the employer "was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident"; that the claimant is required "to present probative facts from which the negligence and the causal relation could reasonably be inferred"; and that the " 'essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.' " However, in *Lavender v. Kurn*, 327 U. S. 645 (1946), the Supreme Court appeared to relax the requirements enunciated in *Tennant* by saying (at p. 653) that "a measure of speculation and conjecture is required" to decide whether there is a reasonable inference of negligence on the part of the employer. Even so, the Court made it clear that there must be "an evidentiary basis" for the jury's verdict and "when there is a complete absence of probative facts to support the conclusion reached" a reversible error occurs. Since *Lavender*, it sems to us that there has been a definite trend in the Supreme Court cases to limit rather than to enlarge the effect of the language employed in the *Lavender* case.

Although jury verdicts under the F. E. L. A. have been allowed to stand even though based on speculation, see, for example, *Gibson v. Elgin, Joliet & Eastern Ry. Co.*, 246

F. 2d 834, 837 (7th Cir. 1957), *cert. den.* 355 U. S. 897 (1957), the denial of *certiorari* does not, as Mr. Justice Frankfurter pointed out in his memorandum filed in 355 U. S. 897, imply approval of a decision for which review is sought. Nor, as was further pointed out in the memorandum, is it to be assumed to be the law of the Supreme Court that "speculation, conjecture and possibilities suffice to support a jury verdict" in F. E. L. A. cases until that Court explicitly so holds. To date it has not done so.

In *Ellis v. Union Pacific R. Co.*, 329 U. S. 649 (1947), it was said (at p. 653) that the F. E. L. A. "does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be 'in whole or in part' the cause of the injury." Moreover, if there is not a reasonable basis in the record for concluding that there was negligence which caused the injury an appellate court is not precluded from setting aside a jury verdict in favor of the employee. See *Ellis v. Union Pacific R. Co., supra; Eckenrode v. Pennsylvania R. Co.*, 335 U. S. 329 (1948). In *Moore v. Chesapeake & Ohio R. Co.*, 340 U. S. 573, 578 (1951), where the action of a district court in setting aside a jury verdict for the employee was affirmed, it was said that an inference of negligence on the part of the employer in that case "would be speculation run riot" and that "speculation cannot supply the place of proof." And in *Schulz v. Pennsylvania R. Co.*, 350 U. S. 523 (1956), an action under the Jones Act (which is similar to the F. E. L. A.), it was said (at p. 526) that the conclusion reached by the jury must be "grounded on evidence consisting of direct statements by the witnesses or proof of circumstances from which inferences can fairly be drawn."

In determining whether a jury case has been made out under the F. E. L. A., the Supreme Court said in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 506 (1957), that the test "is simply whether the proofs justify *with reason* the conclusion that employer negligence played any part, even

the slightest, in producing the injury. * * * Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, *with reason*, the conclusion may be drawn that negligence of the employer played any part at all in the injury * * *. The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may *with reason* make that inference." [Italics ours.] See also *Herdman v. Pennsylvania R. Co.*, 352 U. S. 518 (1957), where the Supreme Court affirmed a directed verdict for the employer on the ground that there was no reasonable basis for inferring that employer negligence contributed to the injuries sustained by the employee.

Furthermore, it is interesting to note that even the Seventh Circuit has abandoned the position it took in *Gibson v. Elgin, Joliet & Eastern Ry. Co., supra*, and has recently stated in *Swartz v. N. Y. Central R. Co.*, 323 F. 2d 713, 714 (7th Cir. 1963), that "we are mindful that even though there is only slight evidence of negligence in a [F. E. L. A.] case, the case must be submitted to a jury. Some evidence, nonetheless, of failure to exercise reasonable care, direct or inferential, must be adduced; otherwise, speculation would be substituted for probative facts and reasonable inferences drawn from those facts."

From a careful analysis of the cited cases, and others not herein referred to, we think it is apparent that the conclusion of a jury as to the negligence of an employer within the meaning of the F. E. L. A. must be based on more than mere speculation and conjecture. Rather, such a finding must reasonably be based on the probative facts, or inferences drawn therefrom, of each particular case. When, therefore, a question arises as to the sufficiency of the evidence, it is necessary for the court, before submitting the case to the jury, to appraise those facts which tend to prove that employer negligence played any part in the injury of

the employee in order to determine whether there is a reasonable basis to justify a finding of negligence by the jury.

In the case at bar, the injured employee contends that there was sufficient evidence under the F. E. L. A. from which the jury could find that another B. & O. employee negligently operated the tractor which caused him to fall into the elevator shaft and that the railroad was negligent in failing to provide him with a safe place to work. We do not agree.

Considering only that evidence which tends to establish the negligence of the employer, there is no proof, direct or circumstantial, that another railroad employee was operating the tractor which allegedly knocked Davis into the elevator shaft. There was no attempt to prove by Davis who, if anyone, was operating the tractor at the time of the accident. The only witnesses who saw the accident, aside from Byrd who testified that Davis himself backed the tractor into the shaft, was the longshoreman Walden. He testified that he did not see the tractor or know anything about its movements before the accident. He did not see the tractor strike Davis and heard only an impact. Just before he reached the elevator, after the accident, he saw a man walking away fast from the west side of the elevator. He could not see the man's face, but was "almost sure" that he was a railroad employee. He further testified, however, that he did not know whether this man had been operating the tractor. There was therefore no direct evidence as to who was operating it. And the fact that Waldon saw a man, whom he surmised was a railroad employee, walking swiftly away from the scene of the accident (but who had not been seen operating the tractor or jumping from it) does not reasonably support an inference that the unidentified man (even assuming him to be a railroad employee) was operating the tractor or, if he were, that he was operating it in a negligent manner. Such an inference would be mere speculation or conjecture. Since the evidence was legally insufficient to show that a railroad employee was operating the

tractor, the issue of employer negligence with respect to the operation of the tractor should not have been submitted to the jury.

Nor do we think that an issue of negligence should have been presented to the jury on the theory that the injured employee was not provided with a safe place to work. An employer is not an insurer of the safety of an employee. *Ellis v. Union Pacific R. Co., supra.* The only duty of the employer in this respect was to provide reasonably safe working conditions and there was no evidence that such was not done here. Nor was there any evidence that the tractor was defective. While it is a fact that bags of sugar were stacked on the floor between the four elevators and that boxes of merchandise were lying near the shore-end east elevator, this was a normal circumstance which would likely exist on any pier used to load and unload freight from ships. Davis testified that the elevator gate was propped open, but by his own statement he was struck while standing six or seven feet from the shaft. The position of the gate therefore had nothing to do with his being struck by the tractor.

Since the issue of employer negligence should not have been submitted to the jury, we hold that the lower court erred in denying the motions for a directed verdict and for a judgment *non obstante veredicto.* We do not reach the question concerning the correctness of the instructions to the jury.

JUDGMENT REVERSED; APPELLEE TO PAY THE COSTS.